Supreme Court of the United States

OCTOBER TERM, 1950

No. 399

JACK H. BREARD,
Appellant,

against

CITY OF ALEXANDRIA,
Appellee.

BRIEF IN BEHALF OF THE NATIONAL ASSOCIATION OF MAGAZINE PUBLISHERS, INC., AS *AMICUS CURIAE.*

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Of Counsel.

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This brief is submitted in behalf of The National Association of Magazine Publishers, Inc., as *amicus curiae,* and is accompanied by written consent of counsel for the respective parties, in accordance with the requirements of Rule 27.

Statement of the Case

The Association accepts and adopts the statement of the case set forth in the Appellant's Brief, as amplified by the Stipulation of Facts contained in the record (R. 6).

Interest of the *Amicus Curiae*

The National Association of Magazine Publishers, Inc. (formerly The National Publishers Association, Inc.), is a New York membership corporation and a trade associa-

tion of the magazine publishing industry. Its membership includes the publishers of some 400 nationally known and distributed magazines and periodical publications, having a combined circulation of approximately 140,000,000 copies per issue (R. 8). The Association has, for many years, sponsored and maintained a Central Registry Plan whereby magazine subscription agencies and publishers having their own field selling organizations expressly undertake to register their solicitors with Central Registry, to adhere to prescribed standards of fair practice in magazine subscription solicitation and to assume full responsibility for all subscriptions obtained (R. 8).

The interest of The National Association of Magazine Publishers, Inc., in this case stems from the fact that the solicitation of subscriptions in the field is one of the three principal methods of circulating and distributing the American periodical press. As the record shows (R. 10, 14A), field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of all general magazines and farm publications reporting to the Audit Bureau of Circulations,[1] and more than 30% of the total average annual circulation per issue of such magazines is attributable to field subscription solicitation, as distinguished from mail subscription solicitation and single copy newsstand sales. When a municipal ordinance of the type of Alexandria Penal Ordinance No. 500 is applied by local enforcement officers to magazine subscription solicitation, it necessarily operates to obstruct the free flow of magazines to the American public and is of vital concern to the Association and its members.

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[1] The Audit Bureau of Circulations (commonly known as ABC) is an independent organization, which regularly verifies and issues reports concerning the volume of circulation of most newspapers and magazines for the benefit of advertisers (R. 10). The Audit Bureau of Circulations was established in this country in 1914; and a similar institution has existed in Great Britain since 1931. Rothenberg, *The Newspaper* (1948), pp. 217-19.

In this Court, as in the Court below, The National Association of Magazine Publishers, Inc., as *amicus curiae*, respectfully submits that the application of Alexandria Penal Ordinance No. 500 to the solicitation of subscriptions for lawful magazines and periodical publications is unconstitutional and void under the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of the press. The Association also submits that the Ordinance in suit is unconstitutional and void for the further reasons set forth in the Appellant's Brief. To avoid repetition, the argument herein is limited to the question of the validity of Alexandria Penal Ordinance No. 500, in the light of the constitutional guarantee of freedom of the press.

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the First Amendment respecting Congressional action are, by virtue of the above-quoted provision of the Fourteenth Amendment, made applicable to

State and municipal action (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-44 (1936); *Lovell* v. *City of Griffin*, 303 U. S. 444, 450 (1938)).

ARGUMENT

The Application of Alexandria Penal Ordinance No. 500 to the Solicitation of Subscriptions for Lawful Magazines and Periodical Publications Abridges the Constitutional Guarantee of Freedom of the Press.

That the constitutional guarantee of freedom of the press is broad in scope and embraces freedom of circulation, as well as freedom of publication, has been emphasized repeatedly by the decisions of this Court.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), the historic struggle for freedom of the press was reviewed at length and the conclusion reached "that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation" (297 U. S. at p. 249). Referring to the "predominant purpose" of the constitutional guarantee of freedom of the press, the Court, per Sutherland, J., stated (297 U. S. at p. 250):

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * *"

In *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938), this Court, speaking through Chief Justice Hughes, declared that the "press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion" (303 U. S. at p. 452), and expressly stated with reference to the municipal ordinance there in suit (303 U. S. at p. 452):

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U. S. 727, 733. The license tax in *Grosjean* v. *American Press Co., supra*, was held invalid because of its direct tendency to restrict circulation."

More recently, in *Winters* v. *New York*, 333 U. S. 507 (1948), Mr. Justice Reed, writing for the majority of the Court, recognized that the "principle of a free press covers distribution as well as publication" (333 U. S. at p. 509). And Mr. Justice Black, in his majority opinion in *Bridges* v. *California*, 314 U. S. 252 (1941), reiterated the view (314 U. S. at p. 265), that—

> "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

Accordingly, the determination of the issue herein as to whether Alexandria Penal Ordinance No. 500 may be applied to the solicitation of subscriptions for lawful magazines and periodical publications, consistently with the constitutional guarantee of freedom of the press, is not governed by mere generalizations concerning the scope of state or local police power, but necessarily requires an examination of "the effect of the challenged legislation", a weighing of "the circumstances", and an appraisal of "the substantiality of the reasons advanced in support of the regulation" (*Schneider* v. *State*, 308 U. S. 147, 161; *Martin* v. *City of Struthers*, 319 U. S. 141, 144).

The Ordinance is prohibitory, rather than regulatory, in its operation and effect

There can be little question that Alexandria Penal Ordinance No. 500 is prohibitory, rather than regulatory, in its operation and effect upon field subscription solicitation. As construed by the municipal authorities, the Ordinance applies to the solicitation of subscriptions for magazines and newspapers;[2] and any solicitation activity at a private residence without the prior consent of the owner or occupant constitutes a violation of the Ordinance punishable by fine or imprisonment, or both (R. 11). Thus, the Ordinance not only abrogates the time-honored status of the solicitor as an invitee or licensee,[3] but its practical effect is to bar at the outset direct personal contact with prospective subscribers which is the basic reason for field subscription solicitation.[4]

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[2] The appellant was arrested and convicted under the Ordinance for engaging in house-to-house solicitation of subscriptions for nationally known and distributed magazines and periodicals, including the Saturday Evening Post, Ladies' Home Journal, Country Gentleman, Holiday, Newsweek, etc. (R. 7, 10, 11); and it was conceded in the Court below that the Ordinance applied equally to the solicitation of subscriptions for newspapers.

[3] See 3 TIFFANY, REAL PROPERTY (3d ed. 1939) §§829, 830; 2 COOLEY, TORTS (4th ed. 1932) §248; RESTATEMENT, TORTS (1934) §167, comment d.

[4] Field subscription solicitation exists because experience has shown that a substantial proportion of potential magazine readers require the personal contacts of an interview in order to encourage them to become regular subscribers. See Wyman, *Magazine Circulation: An Outline of Methods and Meanings* (1936) p. 9. This is especially true in the case of the new magazine and the magazine of limited or special appeal, which command little or no newsstand circulation and must develop their reading public chiefly through field subscription solicitation, leaving it largely to mail subscription solicitation to obtain subscription renewals. See Wyman, *ibid.* pp. 7-9, 39, 81-82, 108-109; also see Association of National Advertisers, Inc., *Magazine Circulation Analysis—1937-1948* (1949), showing break-down of circulation sources for various American magazines.

Any doubt as to the prohibitory effect of the Ordinance is completely dispelled by the opinion below. The Supreme Court of Louisiana, at one point in its opinion, recognizes that the Ordinance "provides for a blanket prohibition of solicitation without invitation, save for food vendors, who are specifically exempt" (R. 21). Later on, the Court frankly states that the Ordinance "is a prohibition of an activity on local territory" (R. 21). This appraisal accords with the view generally expressed concerning the operation and effect of the so-called "Green River" ordinances, of which Alexandria Penal Ordinance No. 500 is typical (R. 10).[5]

The Ordinance strikes at the heart of freedom of the press

Viewing Alexandria Penal Ordinance No. 500 in its true light, it will readily be perceived that the Ordinance strikes at the very heart of freedom of the press. Manifestly, the "predominant purpose" of the constitutional guarantee of freedom of the press cannot be realized by suppressing one of the most important methods of circulating the American periodical press. If magazines and other periodical publications are to serve "as a vital source of public information", and thus ensure the maintenance of our democratic institutions, every channel through which subscriptions are received should be kept open and unobstructed to secure the widest possible distribution. This is implicit

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[5] See McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market* (1941) 8 Law & Contemp. Problems (Duke Univ.) 359, 361; Jensen, *Burdening Interstate Direct Selling Under Claims of State Police Power* (1940) 12 Rocky Mt. L. Rev. 257, 263 *et seq.*; Hearings before the Temporary National Economic Committee, 76th Cong., 2d Sess., Pt. 29, pp. 15973-974. See also *Zimmerman* v. *Village of London*, 38 F. Supp. 582, 584 (D. Ohio 1941); *Donley* v. *City of Colorado Springs*, 40 F. Supp. 15, 19 (D. Colo. 1941); *Jewel Tea Co.* v. *City of Geneva*, 137 Nebr. 768, 781, 291 N. W. 664, 670 (1940); *City of McAlester* v. *Grand Union Tea Co.*, 186 Okla. 487, 489, 98 P. 2d 924, 926 (1940).

in the decisions of this Court hereinabove referred to (at pages 4-5, *ante*), and was clearly recognized by the founders of this republic.

Speaking of the utility of the periodical press, George Washington said:

> "'* * * For myself, I entertain an high idea of the utility of periodical Publications, insomuch that I could heartily desire, copies of the Museum and Magazines, as well as common Gazettes, might be spread through every city, town and village in America. I consider such easy vehicles of knowledge, more happily calculated than any other, to preserve liberty, stimulate the industry and meliorate the morals of an enlightened and free People.' "[6]

And Thomas Jefferson, the chief exponent of the constitutional guarantee of freedom of the press, declared:

> "'* * *. The way to prevent these irregular interpositions of the people, is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, and be capable of reading them.' "[7]

That the goal so defined by these two—the most famous of the founding fathers—has been effectively sought by American magazine publishers, is evidenced by the record in this case. By means of field subscription solicitation, mail subscription solicitation and single copy sales over newsstands, the circulation of general magazines and farm

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[6] Pollard, *The Presidents and The Press* (1947), p. 5.

[7] Id., p. 53.

journals in this country has been increased, during the period 1925-1948, from 61 million copies per issue to 141 million copies per issue (R. 14A); and approximately one-third of this circulation is attributable to field subscription solicitation (R. 14A). Consequently, the suppression of this important method of circulation in the City of Alexandria and other municipalities in the State of Louisiana, and elsewhere in the United States, through the instrument of the so-called "Green River" Ordinance (R. 10), is a matter which "cannot be regarded otherwise than with grave concern" (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250).

The Court below is plainly in error in asserting that the freedom of the press is not denied by the Ordinance, "since the method of distributing magazines is either direct to the patrons via the mails, or through newsstands" (R. 22). By confusing circulation methods with delivery methods, the Court overlooks completely the fact that the solicitation of magazine subscriptions in the field regularly accounts for more than 50% of the magazines delivered to subscribers through the mails (R. 10).

Furthermore, in the light of what has previously been said, the Court below apparently fails to recognize that freedom of circulation is not co-terminous or synonymous with freedom of transportation or delivery, and that freedom of circulation is not to be denied in respect of one method because other methods are available.[8] In the *Grosjean* case, the license tax imposed by the State of Louisiana upon newspapers interfered in no wise with the delivery of copies to the public; the tax was nevertheless declared to abridge the freedom of the press because of "its direct tendency to restrict circulation" (297 U. S. at

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[8] See *Schneider* v. *State*, 308 U. S. 147, 163 (1939); and *cf. Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 495 (1887). That freedom of circulation is not limited to any one method, see *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146 (1946); *Winters* v. *New York*, 333 U. S. 507 (1948).

pp. 244-45). Here, as we have shown (at pages 6-7 *ante*), the challenged legislation is prohibitory in its effect and clearly operates as a previous restraint upon circulation.[9]

The Ordinance is not justified by any overriding public interest

Alexandria Penal Ordinance No. 500 is sought to be sustained as a local police regulation. The ostensible purpose of the Ordinance is the protection of householders from annoyance and from uninvited intrusion into the privacy of their homes (R. 6). The Court below, however, read into the Ordinance a legislative intent to give householders and their property "additional security against the depredations of the lawless" (R. 21).

While one may speculate as to the real purpose of ordinances of this nature,[10] the decisions of this Court make it

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[9] *Cf. Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 133 (1937); *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184 (1946); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 194 (1946); and see Thayer, *Legal Control of The Press* (1944), pp. 62-65, 84-85, 89-96, 102-103.

[10] See McIntire and Rhyne, *Municipal Legislative Barriers to a Free Market* (1941) 8 Law & Contemp. Problems (Duke Univ.) 359, 361; Sawyer, *Federal Restraint on the States' Power to Regulate House-to-House Selling* (1934) 6 Rocky Mt. L. Rev. 85, 87; and Jensen, *Burdening Interstate Direct Selling Under Claims of State Police Power* (1940) 12 Rocky Mt. L. Rev. 257, 269, where it is stated: "A careful investigation in numerous cities in which the Green River ordinance has been passed has, without exception, revealed that it was not the citizens generally but the local retailers who initiated and lobbied the ordinance to adoption." See also Hearings before the Temporary National Economic Committee, 76th Cong., 2d Sess., Pt. 29, pp. 15969-973; and see *Donley* v. *City of Colorado Springs*, 40 F. Supp. 15, 18 (D. Colo. 1941); *McCormick* v. *City of Montrose*, 105 Colo. 493, 508, 99 P. 2d 969, 976 (1939); *Prior* v. *White*, 132 Fla. 1, 15, 180 So. 347, 353 (1938), *Jewel Tea Co.* v. *Town of Bel Air*, 172 Md. 536, 540, 192 Atl. 417, 419 (1937); *City of Orangeburg* v. *Farmer*, 181 S. C. 143, 150, 186 S. E. 783, 785 (1936); *White* v. *Culpeper*, 172 Va. 630, 638, 1 S. E. 2d 269, 273 (1939).

clear that mere "legislative preferences or beliefs respecting matters of public convenience" or "for one or another means for combatting substantive evils," do not furnish sufficient justification for police regulations "which are aimed at or in their operation diminish the effective exercise of rights" guaranteed by the First Amendment (*Schneider* v. *State*, 308 U. S. 147, 161; *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96). Any attempt to restrict those fundamental rights must be justified "by clear and present danger" (*Thomas* v. *Collins*, 323 U. S. 516, 530); and the record is wholly devoid of any such proof in the case at bar.

So far as the record herein shows, only *some* householders of the City of Alexandria are annoyed by solicitors and others do not desire any uninvited intrusion into the privacy of their homes (R. 6).[11] But even if it were established that the Ordinance in suit was adopted in response to popular demand, this would not be a controlling consideration.[12] In the words of Mr. Justice Jackson in *Board of Education* v. *Barnette*, 319 U. S. 624 (at p. 638):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

This is not to say that the solicitation of magazine subscriptions within the City of Alexandria is not subject to reasonable regulation; nor does it mean that the maxim—"a man's home is his castle"—to which the Court below adverts in its opinion (R. 22), is not entitled to appropriate

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[11] *Cf. Martin* v. *City of Struthers*, 319 U. S. 141, 144 (1943).

[12] See *Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943); *Marsh* v. *Alabama*, 326 U. S. 501, 505 (1946).

recognition.[13] It does mean, however, that neither the municipal authorities of the City nor a majority of its inhabitants may substitute their judgment for the judgment of the individual householder, and thereby violate both the maxim and the constitutional guarantee of freedom of the press.

The fundamental issue here presented, as well as its proper solution, was considered by this Court in *Martin* v. *City of Struthers*, 319 U. S. 141 (1943), holding invalid, as a denial of freedom of speech and the press, a municipal handbill ordinance preventing the distribution of religious leaflets at private premises.[14] In the concluding portion of the opinion of the Court, Mr. Justice Black stated (319 U. S. at pp. 146-49):

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.
>
> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more.

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[13] See *Martin* v. *City of Struthers*, 319 U. S. 141, 150 (1943) (concurring opinion of Murphy, J.).

[14] The issue here presented was not involved in *Town of Green River* v. *Bunger*, 50 Wyo. 52, 58 P. 2d 456 (1936), appeal dismissed 300 U. S. 638, reh'g. denied 300 U. S. 688 (1937). The issue was involved in the case of *People* v. *Bohnke*, 287 N. Y. 154 (1941), in which certiorari was denied by this Court, 316 U. S. 667, reh'g. denied 316 U. S. 713 (1942).

We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home.

"The Struthers ordinance does not safeguard these constitutional rights. For this reason, and wholly aside from any other possible defects, on which we do not pass but which are suggested in other opinions filed in this case, we conclude that the ordinance is invalid because in conflict with the freedom of speech and press."

These pronouncements in the *Struthers* case have, we respectfully submit, equal force and application in the case at bar. Reasonable regulation, not blanket prohibition, provides the proper solution to the problem of house-to-house solicitation;[15] and if protection of individual householders from annoyance and intrusion is the local legislative aim,

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[15] See *Lovell* v. *City of Griffin*, 303 U. S. 444, 451 (1938); *Schneider* v. *State*, 308 U. S. 147, 164-165 (1939); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 117 (1943); also see Thayer, *Legal Control of The Press* (1944) pp. 89-96.

the conflicting interests in this case, as in the *Struthers* case, can readily be accommodated, consistently with the constitutional guarantee of freedom of the press, by the traditional method to which Mr. Justice Black refers. The law of the State of Louisiana in this latter respect is clear.[16]

In this connection, the plain implications of the *Struthers* decision may not be avoided on the ground that the business of publishing and distributing magazines or newspapers is conducted for profit.[17] The abridgement clause of the First Amendment speaks unequivocally without regard for profit motive; and the fundamental rights of free speech and a free press are "not peculiar to religious activity and institutions alone" (*Thomas* v. *Collins*, 323 U. S. 516, 531), but extend to secular and business activities (*Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Thomas* v. *Collins*, 323 U. S. 516; *Winters* v. *New York*, 333 U. S. 507; *United States* v. *C. I. O.*, 335 U. S. 106). Indeed, it is perhaps more correct to say that the freedom of the press "is not confined to newspapers and periodicals", but "necessarily embraces pamphlets and leaflets" of a religious nature (*Lovell* v. *City of Griffin*, 303 U. S. 444, 449-51, 452). Certainly, if the "predominant purpose" of the constitutional guarantee of the freedom of the press is "to preserve an untrammeled press as a vital source of public information" (*Grosjean* v. *American Press Co.*, 297 U. S. at p. 250), Alexandria Penal Ordinance No. 500 and like ordinances, as applied to the solicitation of subscriptions for lawful magazines and periodicals, should not be permitted to stand.

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[16] See *Martin* v. *State*, 199 La. 39, 5 So. 2d 377 (1941), sustaining the conviction of a member of Jehovah's Witnesses under a "general trespass after warning" statute, as against contentions that the statute violated the constitutional guarantees of freedom of religion, freedom of speech and freedom of the press.

[17] See *Near* v. *Minnesota*, 283 U. S. 697, 720 (1931); *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945); *Associated Press* v. *United States*, 326 U. S. 1, 27-28 (1945) (concurring opinion of Frankfurter, J.); *United States* v. *C.I.O.*, 335 U. S. 106, 154-55 (1948) (concurring opinion of Rutledge, J.).

Conclusion

The National Association of Magazine Publishers, Inc., as *amicus curiae*, respectfully urges that the judgment appealed from be reversed.

Respectfully submitted,

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